No. 04-1384

In The

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL; HARVEY GORDENKER; FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

On A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE MACOMB COUNTY MICHIGAN IN SUPPORT OF RESPONDENTS

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I. INTEREST OF AMICUS CURIAE MACOMB COUNTY MICHIGAN

The economic prosperity of Macomb County depends on a clean, safe, and ecologically healthy Lake St. Clair. Lake St. Clair cannot be effectively protected however, unless its tributaries and wetlands are also protected.

Lake St. Clair is frequently called "the heart of the Great Lakes" because of its resemblance to a human heart on maps and satellite photographs and also because of its location in the middle of the St. Clair-Detroit River system connecting the upper Great Lakes to the lower Great Lakes.[1] Lake St. Clair is the smallest and shallowest of the glacial lakes forming the Great Lakes system.[2]

On the United States side, Lake St. Clair is bordered by the Michigan counties of Wayne, Macomb, and St. Clair. Macomb County's 53 miles of shoreline constitutes over 30 per cent of the total shoreline of the Lake, excluding the islands of the St. Clair Delta.

Lake St. Clair is an asset of remarkable value to the citizens of Macomb County and the entire Southeast Michigan region, providing superb conditions for recreational boating, fishing, diving, and swimming.[3]

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[1] See *Exhibit* 1, Map of Lake St. Clair.

[2] Lake St. Clair has an area of about 430 square miles. It is about 26 miles long and 24 miles wide, and has an average natural depth of 12 feet. U.S. Army Corps of Engineers, *St. Clair River and Lake St. Clair Comprehensive Management Plan*, June 2004, at 1-25.

[3] The clear, shallow waters of Lake St. Clair provide ideal conditions for pleasure boating, swimming, and fishing. The Lake furnishes excellent habitat for warm-water fish such as walleye, yellow perch, small mouth bass, and muskellunge.

Lake St. Clair is one of the most heavily used recreational boating lakes in the world. Recreational boating on Lake St. Clair currently generates an estimated 249 million dollars a year in expenditures in the region. In 1994, the last year for which relevant statistics are available, there were 75 marinas in Macomb County alone.[4]

Much of the boating is for the purpose of fishing. Lake St. Clair supports one of the largest sport fisheries in the world, with an estimated direct value to the regional economy in excess of 30 million dollars per year. Forty-eight per cent of all sport fish and 33 per cent of overall fish caught *in the entire Great Lakes* are caught in Lake St. Clair.[5]

Petitioners' wetland lies within the Macomb County portion of the Anchor Bay watershed, an area that drains directly into Lake St. Clair. Macomb County has a direct and vital interest in upholding federal jurisdiction over Petitioners' wetland. Anchor Bay, located in the northwestern portion of Lake St. Clair, is one of the richest and most ecologically diverse areas of Lake St. Clair. To the east, Anchor Bay is bordered by islands of the St. Clair Delta, the only major river delta in the Great Lakes and one of the largest freshwater deltas in the world.[6] St.

[4] *St. Clair River and Lake St. Clair Comprehensive Management Plan*, *supra* at 7-127. More than 200,000 boats are registered in the four US counties on or near Lake St. Clair. This represents more than 20 per cent of all the boats registered in Michigan, and is a larger number of boats than are registered in the States of Maryland, Connecticut, and Kentucky, all of which have significant coastal or water resources. As of 1994, a total of 211 marinas were located in Wayne, Macomb, and St. Clair counties. *Id.*

[5] *Id.* at 7-128.

[6] *Id.* at I-24.

Johns Marsh, one of the largest coastal wetlands in the Great Lakes and a home to many rare or endangered plant and animal species, covers a major part of the north shore of Anchor Bay.[7] Major tributary streams that flow into Anchor Bay include Au Vase Creek[8] (also known locally as "the River Voss"), Beaubien Creek, Crapau Creek, Marsac Creek, Swan Creek, the Marine City Drain, and the Salt River.[9]

The Anchor Bay watershed contains approximately 38,000 acres of ecologically sensitive land, including a wide variety of wetland types.[10] At least 12 varieties of submerged plants and 300 species of benthic macroinvertebrates are found in Anchor Bay, providing outstanding habitat for fish and waterfowl.[11] Blessed with such resources, Anchor Bay provides outstanding recreational and aesthetic opportunities for the residents of

[7] Anchor Bay Technical Committee, *Anchor Bay Watershed Management Plan*, December, 2003, at 3.

[8] Originally the "Riviere Aux Vasse." "Au Vase" is a French phrase meaning "to the pot." Pers. Conv. With Gennifer Ayotte, November 3, 2005. In 1936, University of Michigan archeologists discovered at least 350 graves and large quantities of ceramic pottery fragments on the banks of the Au Vase. The Au Vase site dates to a segment of native American history known as the Late Woodland Era (about 1000 A.D. to 1400 A.D). Gonyeau, *Indians Came Here to Bury Their Dead*, Anchor Bay Beacon, December 28, 1983. It is probable that the French settlers who moved into the area in the 18th century gave Au Vase Creek its name because they had discovered the pottery fragments at this site.

[9] *Anchor Bay Watershed Management Plan*, *supra* at vi.

[10] *Id.* at 3.

[11] One hundred and seventeen fish species are found in Anchor Bay. The bay is also a major resting and breeding ground for migratory waterfowl, including the canvasback duck, mallard, black duck, Canada goose, and tundra swan. *Id.*

Macomb and St. Clair counties as well as many visitors from throughout the United States and Canada.[12]

14,000 years ago the Anchor Bay watershed was covered by Lake Maumee, which was formed from the melt waters of a glacier.[13] As the glacier retreated, Lake Maumee gradually diminished and exposed large areas of former lake bottom. Today, the coastal terrain of Lake St. Clair is mostly flat clay lake plain crossed by low sandy ridges – the ancient beaches of Lake Maumee. Sugarbush Road, located to the south and east of Petitioners' wetland, runs along the crest of one of these pre-historic beaches.

In 1800, Lake St. Clair was ringed with coastal wetlands and a wide variety of wetland and upland natural communities.[14] Over the next century and a half however, virtually all of the coastal marshes and most of the wetland areas along the Lake's tributaries were destroyed.

Anchor Bay area was cleared and drained for agriculture in the 19th century. Today, the Anchor Bay watershed area is rapidly urbanizing. Population in the Anchor Bay watershed is projected to increase by 40 per cent between 2000 and 2030. Households are expected to increase by 58 per cent.[15]

[12] *Id.* at 1.

[13] Great Lakes Commisison, *Lake St. Clair Coastal Habitat Assessment* (2004) at 8.

[14] See *Exhibit* 2, 1800 Michigan Natural Features Inventory Map of Macomb County Vegetation circa 1800.

[15] *Anchor Bay Watershed Management Plan*, *supra* at vii.

Although current water quality in Anchor Bay is good, increased imperviousness and decreases in wetlands, woodlands, and open fields associated with urban development can be expected to harm Anchor Bay and its tributaries by increasing flow quantity, sediment, nutrients, bacteria, and chemical contaminants, and by decreasing available habitat for fish and wildlife.[16]

Increasing impervious surfaces degrades water quality by causing increased peak flows of storm water, accelerating erosion, and decreasing natural drainage and infiltration capacity.[17] Excessive erosion and sedimentation result in changes to stream morphology, increased turbidity, increased pollutant loading, and destruction of streambed wildlife habitat. Accelerated soil erosion and sedimentation is an especially significant problem in the Lake St. Clair watershed because the underlying soils are heavy clay. Heavy clay soils tend to remain in suspension and are difficult to remove with conventional sedimentation techniques.[18] Loss of wetland habitats and native fish populations has been identified as a major concern for fish management in Lake St. Clair.[19]

Macomb County has taken a leading role in protecting the waters of the County and of Lake St. Clair. In 1994 serious water quality problems, including high bacteria counts and excessive weed growth, forced county swimming

[16] *Lake St. Clair Coastal Habitat Assessment* (2004), *supra* at 8.

[17] *Anchor Bay Watershed Management Plan*, *supra* at 5.

[18] *Anchor Bay Watershed Management Plan*, *supra* at 11.

[19] *St. Clair River and Lake St. Clair Comprehensive Management Plan*, *supra* at 7-135.

beaches to close most of the summer. Aware that the degraded state of water quality was having a serious impact on the local economy,[20] the County formed the Blue Ribbon Commission on Lake St. Clair to develop a plan of action to marshal international, state, and local efforts to protect the lake and its tributaries.

In 1997 the Blue Ribbon Commission issued a report containing 93 specific recommendations, including among others the creation of an organization to serve as a permanent advocate for the County's lakes and rivers, and continued enforcement of environmental laws by the County Prosecutor's Office. Later that year the Macomb County Commission authorized the creation of the Macomb County Water Quality Board and the Water Quality Unit of the Macomb County Environmental Prosecutor's Office. Today the Macomb County Water Quality Board advises the County Commission regarding water quality-related issues, recommends policy initiatives and regulatory actions, and serves as a public forum for addressing water quality issues of concern to Macomb County. The Water Quality Unit of the Macomb County Prosecutor's Office provides civil and criminal enforcement of water-quality related environmental laws and regulations in Macomb County, and in addition takes a significant role in developing water-quality related environmental policies and programs in Macomb County and in southeast Michigan.[21]

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[20] *Macomb County Blue Ribbon Commission on Lake St. Clair, Report and Recommendations*, August 28, 1997 at 2.

[21] The Macomb County Prosecutor's Office is the only county prosecutor's office in Michigan that has a unit exclusively dedicated to enforcing environmental laws.

Other Macomb County Departments have also developed significant roles and responsibilities for protecting Lake St. Clair and its tributaries. The Macomb County Health Department monitors surface water quality on a weekly basis at over 50 locations throughout the county including the Lake. The Health Department's Surface Water Improvement and Monitoring (SWIM) Team investigates suspected sources of water pollution on an ongoing basis and works with the prosecutor to correct violations of the county sanitary code and state laws. The Macomb County Planning and Economic Development Department recently drafted a series of model environmental protection ordinances, including a model wetland ordinance, to help local communities develop environmentally sound land use plans and policies. The Health Department, Planning Department, Prosecutor's Office, and Public Works Department collaborate in regional water quality planning initiatives such as the sub-watershed management plans being developed under Michigan's storm water management permitting program, and the Macomb/St. Clair Inter-County Watershed Management Advisory Group, the steering committee for implementing the St. Clair River and Lake St. Clair Comprehensive Management Plan.

Protecting Lake St. Clair and its tributaries is critical to the economic future of the County. Recognizing this, county leaders have developed a management structure and directed substantial county resources to the task of protecting the Lake and its tributaries. A decision to narrow or eliminate Clean Water Act jurisdiction over non-navigable wetlands and tributaries that are adjacent to traditionally navigable waters would undermine efforts to protect water quality in Macomb County. For these reasons, Macomb County has a direct and substantial interest in the outcome of this case.

II. SUMMARY OF THE ARGUMENT

Petitioners' wetland is adjacent to tributaries of Au Vase Creek, a navigable water that empties into Lake St. Clair. Since the wetland is separated from the ditch only by a man-made berm, it is subject to Corps of Engineers regulations defining waters of the United States to include wetlands adjacent to tributaries of navigable waters.

The federal government cannot adequately protect the navigable waters of the Au Vase Creek, Anchor Bay, and Lake St. Clair from contamination or impairment without having the authority to regulate non-navigable tributaries and wetlands adjacent to these waters. Since the Clean Water Act Amendments of 1972 were intended to restore the chemical, physical, and biological integrity of the nation's waters, it is reasonable to conclude that the Corps of Engineers possesses the authority to regulate adjacent wetlands and tributaries including wetlands separated from tributaries by man-made barriers. 33 C.F.R. 328(a)(7) (1999).

Wetland loss in Macomb County has degraded water quality in Lake St. Clair and its traditionally navigable tributaries. Petitioners' wetland provides important aquatic habitat and water storage functions to the Anchor Bay watershed. If Petitioners' wetland is destroyed there will be increased risks of harm to the navigable waters of Au Vase Creek, Anchor Bay, and Lake St. Clair. Petitioners' wetland is thus "inseparably bound up" with navigable waters of the United States.[22]

[22] Macomb County supports Respondents' argument that Section 404(a) of the federal clean water act does not violate the Commerce Clause of Article III of the United States Constitution. Macomb County

(Continued on following page)

III. ARGUMENT

A. PETITIONERS' WETLAND IS SUBJECT TO CORPS OF ENGINEERS REGULATIONS BECAUSE IT IS ADJACENT TO TRIBUTARIES OF TRADITIONALLY NAVIGABLE WATERS

Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), regulates the discharge of dredged or fill material into "navigable waters." "Navigable waters" are defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

United States Army Corps of Engineers regulations define "waters of the United States" to include, among other waters "wetlands adjacent" to waters used or susceptible to use in interstate or foreign commerce, or to tributaries of such waters. See 33 C.F.R. 328.3(a)(1), (6) and (7). The Corps defines "adjacent" to mean "bordering, contiguous, or neighboring," including "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c).

Petitioners own a triangular-shaped parcel of land located about one mile from the Lake St. Clair shoreline.[23] Over 80% of the parcel (15.96 acres out of the total 19.61 acres) is a forested wetland. A ditch runs along and within

believes that any further argument the County could offer on that issue would be merely cumulative to the arguments and authority presented by the Parties and therefore not particularly helpful to this Court. Accordingly, the argument in this amicus brief addresses only the issue of the scope of federal regulatory authority under Section 404(a) of the federal clean water act.

[23] *Exhibit* 3, attached.

Petitioners' southwest to northeast property line (the "hypotenuse of the triangle")[24] through what the record of this case establishes is also wetland terrain.[25] The ditch enters the Sutherland-Oemig Drain near the northeast corner of the property, and it is also connected to other ditches southwest of the property.[26] The Sutherland-Oemig Drain and the other ditches empty into Au Vase Creek, which in turn empties into the Anchor Bay area of Lake St. Clair. Lake St. Clair and the Au Vase Creek upstream to the Jefferson Avenue bridge are "navigable waters of the United States" subject to Section 10 of the River and Harbors Act of 1899. See 33 C.F.R. 329.16.[27]

It is unclear from the record when the ditch was constructed and for what purpose. Petitioners' consultant and Corps of Engineers personnel have speculated that the ditch may have been dug as long as 50-60 years ago in connection with the construction of the Sebille Manor military base housing project. See e.g., *Petitioner's Brief In*

[24] It is not clear from the record of this case how far the ditch extends. It crosses Petitioners' property line near Donner Road and runs entirely within Petitioners' property 1,800 feet until it joins the Sutherland-Oemig Drain a short distance northeast of Petitioners' northern property line. *Exhibit* 4, attached.

[25] See Corps of Engineers Administrative Appeal Decision of March, 5, 2001 at pp. 2-3.

[26] *Id.* at p. 3.

[27] *Navigable Michigan Waters of the United States, U.S. Army Corps of Engineers Detroit District*, February 10, 2000, at p. 22. Under Section 10, navigable waters of the United States are waters that are, have been, or are susceptible for use to transport interstate or foreign commerce. 33 C.F.R. 329.4. The Au Vase has a colorful history of use in foreign commerce. It was a popular landing spot for bootleggers smuggling liquor across Lake St. Clair from Canada during the prohibition era. Trinity, *The Heritage of Chesterfield*, The Richmond Review, September 13, 1967.

Support of Petition for a Writ of Certiorari at p. 4. This speculation is off the mark. The ditch and berm were actually constructed 33 and a half years ago in connection with a sanitary sewer project. In the spring of 1972 Chesterfield Township extended a 15" sanitary force main from an existing line west of Petitioners' property to the northwest along Petitioners' property line to a lift station. The line continues as a 24" line from the lift station northwest along Petitioners' property line underneath the Sutherland-Oemig Drain to its junction with another sewer line east of Petitioners' property.[28] The Township's contractor excavated the ditch to drain runoff from the construction road and the lift station construction site.[29] The project had nothing to do with the Sebille Manor subdivision, which had been built years earlier.[30]

Petitioners must have been aware of this sewer construction project, because they acquired the property prior to 1972.[31] Indeed, the Township's plans show that the

[28] See *Exhibits* 5A and 5B, *Township of Chesterfield Sanitary Sewer As Built Plans dated 7-8-72.*

[29] Pers. Conv. With Joseph Gajewski, Chesterfield Township Water and Sewer Department, December 13, 2005. Mr. Gajewski has worked for the Township Water and Sewer Department since 1970 and personally recalls the project. He also stated that the Township had originally intended that the construction road would be the permanent service road providing access to the lift station. However, the road proved unserviceable due to the wet, marshy terrain and the Township quickly abandoned it. The Township now services the lift station from a short road connecting to a nearby subdivision. *Id.*

[30] See *Exhibit* 6, an aerial photo taken in 1956, and *Exhibit* 7, an aerial photo taken in 1962, establish that the Sebille Manor subdivision was constructed between 1956 and 1962.

[31] Petitioners' attorney has stated that Petitioners had acquired the property in 1969. *Wetland Application Hearing Tr. at p. 11.* The earliest instrument showing Petitioners' interest in the property recorded in the

(Continued on following page)

sewer, lift station, and road were all constructed within an easement located within Petitioners' property line.

In short, the ditch and the earthen berm running along the western edge of the ditch were constructed by a Township contractor for the purpose of dewatering the sewer easement area. The ditch was excavated to drain the lift station area and the construction road running to it. The earthen berm was created to prevent water from the adjacent wetlands from flooding the ditch and overflowing into the construction area. Since the ditch was excavated in wetland, the nearby sewer was installed in an area that in all probability was also a wetland. The entire project would almost certainly have required a clean water act permit if current Corps of Engineers regulations had been in effect in 1972.[32]

The lower courts were absolutely correct in concluding that Petitioners' wetland is adjacent to a tributary of a navigable water subject to regulation under 33 C.F.R. 328.3(a)(7).

Macomb County Register of Deeds is a warranty deed dated July 5, 1971 showing Petitioners Keith A. Carabell and Harvey Gordenker as grantees. See *Exhibit* 8, attached. This deed contains no reference to any earlier conveyances of the property involving Petitioners.

[32] See *Exhibit* 7, 1962 *Aerial Photo*, and *Exhibit* 9, *National Wetland Inventory (MNFI) Map*. The photo and the map show that the area where the sewer was constructed was part of a larger wetland complex that covered both sides of the Sutherland-Oemig Drain and included Petitioners' property. There is no reason not to conclude that the sewer was constructed in (and resulted in the destruction of) wetland that was connected to the Sutherland-Oemig Drain prior to 1972.

B. THE FEDERAL CLEAN WATER ACT AUTHORIZES THE CORPS TO REGULATE PETITIONERS' WETLAND

Petitioners' central claim is that the Clean Water Act does not authorize federal regulation of wetland that is not physically connected to traditionally navigable waters because such wetlands lack "a meaningful connection to the Nation's navigable waters." *Petitioners' Brief* at p. 14. This argument is fatally flawed for at least two reasons: first, it is flatly contradicted by the previous decisions of this Court; second, it has absolutely no support in the facts of this case.

This Court has repeatedly held that Clean Water Act jurisdiction over waters of the United States extends beyond traditionally navigable waters to include non-navigable wetlands adjacent to navigable rivers, streams, and other conventionally identified waters. *United States v. Riverside-Bayview Homes, Inc.*, 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985),[33] *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001) ("*SWANCC*").

In *Riverside-Bayview, supra*, this Court found that the Clean Water Act Amendments of 1972 were enacted to protect the integrity of aquatic ecosystems by controlling discharge of pollutants at their source, and that Congress had recognized that broad federal authority was needed to

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[33] The *Riverside-Bayview* case also involved a wetland located in Macomb County. The respondent in *Riverside-Bayview* owned an 80 acre low-lying marshy area near Lake St. Clair. The marshy area is adjacent to Black Creek, a navigable waterway. 474 U.S. at 131, 106 S.Ct. at 461.

accomplish this. "[I]n keeping with these views," this Court concluded, "Congress chose to define the waters covered by the act broadly." *Id.* at 474 U.S. 133, 106 S.Ct. 462.

As this Court recognized in the *SWANCC* decision, the scope of federal jurisdiction over non-navigable waters depends on the nexus between traditionally navigable waters and non-navigable waters. *SWANCC, supra* at 167, 680, see also *Riverside-Bayview, supra* at 132, 462. The nexus between navigable waters and non-navigable waters is clearly an ecological nexus arising from the statutory purpose of protecting the water quality and ecological integrity of navigable waters. In *Riverside-Bayview, supra*, this Court held that the clean water act authorized the Corps of Engineers to regulate adjacent wetlands based on its "ecological judgment about the relationship between waters and their adjacent wetlands." *Id.* at 134, 463.

Although the *Riverside-Bayview* decision applied only to non-navigable wetland that directly abutted traditionally navigable waters, the reasoning of that decision applies with equal force to non-navigable tributaries and wetlands adjacent to non-navigable tributaries of traditionally navigable waters. The *Riverside-Bayview* opinion noted that the Corps has determined that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality" since they may, among other things "filter and purify water draining into adjacent bodies of water and slow the flow of surface runoff into lakes, rivers, and streams and thus

prevent flooding and erosion." *Id.*[34] The Corps reached a strikingly similar conclusion with respect to the Petitioners' wetland, finding that it "provides valuable seasonal habitat for aquatic organisms" and "water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Au Vase Creek, and Lake St. Clair." *Letter from Lt. Col. Richard J. Polo Jr., October 5, 2000,* at p. 1.

If the Clean Water Act authorizes the Corps to regulate non-navigable waters on the basis of its judgment concerning the waters' ecological relationship to navigable waters, and if the Corps has found, as here, that activities in the non-navigable waters may influence the water quality and ecological integrity of traditionally navigable waters, the conclusion is inescapable that the non-navigable waters such as Petitioners' wetland can be federally regulated. *SWANCC, supra*; *Riverside-Bayview, supra*. Such regulation reflects the Corps professional judgment that the non-navigable waters are "'inseparably bound up with the 'waters' of the United States.'" (cite omitted), *SWANCC, supra*.

Indeed, the Corps' conclusions regarding the relationship between Petitioners' wetlands and Au Vase Creek and Lake St. Clair have never been seriously disputed by Petitioners. Instead, Petitioners hang their hats on the proposition that the Clean Water Act cannot regulate waters that lack a "hydrological connection" to "federal"

[34] This Court expressed no opinion regarding the authority of the Corps to regulate wetlands that are not adjacent to bodies of open water. *Id.* at 474 U.S. 131-132, F.n. 8, 106 S.Ct. 461.

waters. *Petitioners' Brief* at p. 29. This assertion has no support in law or fact and is utterly wrong.

First, there is no requirement for a hydrological connection in the language of the Clean Water Act or its administrative regulations. In fact, the Corps administrative definition of waters of the United States specifically includes waters having no hydrological connection. See 33 C.F.R. 328.3(c), *supra*.

Second, Petitioners' assertion is contrary to the controlling decisions of this Court. In *Riverside-Bayview* this Court held – unanimously – that the Corps was authorized to regulate a wetland that abutted a navigable water but had no direct hydrological connection to that water. The Corps' determination that the abutting wetland was "inseparably bound up" with navigable waters was not unreasonable, in light of the history and purpose of the act, because the Corps had concluded that wetlands "may affect the water quality of adjacent lakes, rivers, and streams even when the waters of those bodies do not actually inundate the wetlands." *Id.* at 474 U.S. 131, 106 S.Ct. 461.[35] See also *SWANCC*, *supra* at 176, 685 F.n. 2 (Stevens, dissenting).

Third, the *SWANCC* decision provides no support for Petitioners' argument. *SWANCC* involved an abandoned gravel pit that had gradually filled with water and become

[35] In ruling that the wetland was an adjacent wetland, this Court effectively sustained the Corps definition of "adjacent" waters ("bordering, contiguous, or neighboring" including "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c). Obviously this definition does not include any requirement for a hydrological connection to other regulated waters.

a migratory bird habitat. The sole basis asserted for federal jurisdiction in *SWANCC* was the "Migratory Bird Rule." This Court invalidated the Migratory Bird Rule because the Rule lacked the nexus with traditionally navigable waters required by the language of the Clean Water Act and because there was no history of Congressional acquiescence to the Rule. *SWANCC*, *supra* at 170, 682.[36]

The flooded gravel pit in *SWANCC* was wholly isolated from navigable waters, not adjacent to navigable waters as in *Riverside-Bayview* or adjacent to tributaries of navigable waters as the wetlands are in this case. The majority opinion in *SWANCC* distinguished *Riverside-Bayview* on the basis that Congress had clearly acquiesced to the regulations pertaining to adjacent wetlands, in contrast to the Migratory Bird Rule, which was issued as an administrative interpretation years later. The regulations upheld in *Riverside-Bayview* are an earlier version of, and substantially identical to, the regulations relied upon by the Corps in this case.

In sum, Petitioners' assertion that "*Riverside-Bayview* and *SWANCC* establish . . . that wetlands have a significant nexus with the navigable waters when . . . at a minimum, they have a hydrological connection via ground or surface water with the navigable waters of the United States" (*Petitioners' Brief* at pp. 28-29) is simply not true. What this Court ruled instead is that "the breadth of federal regulatory authority contemplated by the Act" authorizes the Corps to exercise its "ecological judgment"

[36] The Corps has specifically disavowed any reliance on the Migratory Bird Rule in asserting jurisdiction over Petitioners' wetland.

about the relationship between non-navigable waters and navigable waters, and to regulate the former on the basis of that judgment. See *Riverside-Bayview*, *supra* at 134, 463. Indeed, Petitioners' insistence that a "significant" nexus must include a direct hydrological connection amounts to a request for this Court to substitute its own judgment of what is ecologically significant for that of the Corps; to disregard the Congressional intention to restore and maintain the ecological integrity of the nation's waters by broadening federal jurisdiction under the Clean Water Act Amendments of 1972; and to return the scope of federal jurisdiction over the nation's waters to the approximate dimensions of the Rivers and Harbors Act of 1899.[37]

Petitioners' invitation to undo the Clean Water Act should be rejected by this Court.

C. ELIMINATING CLEAN WATER ACT JURISDICTION OVER WETLANDS NOT DIRECTLY CONNECTED TO TRADITIONALLY NAVIGABLE WATERS WOULD HAVE A SERIOUS IMPACT ON EFFORTS TO PROTECT THE WATERS OF LAKE ST. CLAIR

Petitioners' claim that federal jurisdiction is limited to wetlands featuring a direct hydrological connection to traditionally navigable waters has serious implications for the waters of Macomb County and Lake St. Clair. If this Court rules in Petitioners' favor, it is likely that federal jurisdiction over most Macomb County wetlands will be eliminated. This would seriously harm efforts to protect

[37] 33 U.S.C. § 403.

the navigable waters of the County and of Lake St. Clair from pollution and impairment.

Virtually all remaining wetland areas in Macomb County have been drastically impacted by human activity. The huge wetland areas that existed at the time of European settlement have been dredged, filled, and drained in piecemeal fashion. Most wetlands in contemporary Macomb County exist as the result of previously drained farm fields reverting to their natural state. The remaining wetlands are widely fragmented because they are separated by roads, subdivisions, drains, and ditches.

The history of Petitioners' land is typical of the pattern of development in the County. At the time of European settlement, Petitioners' property was part of a large hardwood swamp that extended all the way to the lakeshore.[38] Wetland destruction in the vicinity accelerated beginning in the middle of the 19th century. Available Macomb County records indicate the Sutherland-Oemig Drain was constructed sometime prior to 1895, at a time when the land in the vicinity was being farmed.[39]

Most of Petitioners' property was cleared and drained for farming, probably after the Civil War. Aerial photographs indicate the property was mostly clear of trees until the early 1960s.[40] After farming ceased in the area,

[38] See *Exhibit* 2, *1800 MNFI Vegetation circa 1800 of Macomb County*.

[39] Pers. Conv. With Kelly Kaufman, Macomb County Department of Public Works, December 6, 2005.

[40] See *Exhibit* 6, *1956 Aerial Photo*, and *Exhibit* 7, *1962 Aerial Photo*. These photos show that Petitioners' land was clear of trees except in the northeast corner as late as the early 1960s. It is probable

(Continued on following page)

the terrain on Petitioners' land began to revert to its natural state. By the late 1970s, Petitioners' property was part of a larger wetland complex approximately 80 acres in size.[41] This wetland complex consisted of palustrine forested and scrub-shrub wetland areas covering both sides of the Sutherland-Oemig Drain. Since then, the area has become increasingly urbanized, and most of the larger wetland area around Petitioners' property has once again disappeared.

In short, Petitioners' wetland is not "virgin territory." It was cleared, drained, and farmed for many decades. Its hydrology has been dramatically altered by dredging, filling, and draining activity within and nearby its location.

Some may argue that wetlands such as Petitioners' are not worth saving because they are not "pristine." Macomb County contends that it is critical to protect the wetlands remaining in the County precisely *because* there are so little of them left.[42] Pristine or not, the remaining wetlands still provide the benefits identified by Congress when it passed the Clean Water Act Amendments of 1972. If wetlands continued to disappear, stream bank erosion and habitat degradation are bound to worsen. Water

---

that the treed area in the northeast corner is a remnant of the original swamp that covered the area.

[41] See *Exhibit* 9, *National Wetland Inventory Map, New Haven Quadrangle.* The United States Geological Survey National Wetland Inventory Maps were prepared from available data in 1978.

[42] It is estimated that only 8 per cent of the land area in Michigan within 10 miles of Lake St. Clair is wetland. This land area was once largely dominated by coastal and inland wetlands. *Lake St. Clair Coastal Habitat Assessment* (2004), *supra* at 59.

quality will gradually continue to deteriorate despite government efforts to eliminate illegal discharges of pollution and to upgrade existing pollution control facilities.

Despite all of the harm done to it over the past 150 years, Petitioners' wetland still functions to protect the ecological integrity of Au Vase Creek and, ultimately, Lake St. Clair. As the Corps of Engineers found, Petitioners' wetlands continue to provide valuable benefits to the local aquatic ecosystem, including flood prevention, surface water storage and pre-treatment, and aquatic habitat.[43] These wetland functions help protect the navigable waters of Au Vase Creek and Anchor Bay from becoming degraded by excessive runoff, increased erosion, and biological and chemical contamination.

The fact that Petitioners' wetland does not directly abut navigable waters but instead is adjacent to non-navigable tributaries of navigable waters does not negate its ecological relationship to the Creek and the Lake. As the Corps found, Petitioners' wetlands play a valuable role in protecting the traditionally navigable waters of the Creek and the Lake even though they lack such a connection.

Forcing the Corps of Engineers to draw fine distinctions between regulated and non-regulated wetlands based on surface or sub-surface hydrology would impose enormous new administrative burdens on the Corps. Imposing this new requirement would require the Corps to perform costly and time-consuming investigations to document, on

---

[43] Approximately 50% of Petitioner's property is in the 100 year and 500 year floodplain of the Sutherland-Oemig Drain. See *Exhibit* 10, *1974 Federal Flood Insurance Map.*

a case-by-case basis, the presence or absence of hydrological connections. Such investigations would have little or nothing to do with protecting navigable waters. Since so many County wetlands have been altered by human activities, it is likely that hydrological connection standard would render the Clean Water Act ineffective in Macomb County by excluding too many wetlands from regulation.

In addition, such a requirement would open the door to new efforts to evade the law. Property owners would be tempted to construct barriers between wetlands and open waters in order to avoid federal regulation. Such a new rule would also create unwarranted distinctions between regulated and unregulated wetland based on who severed the hydrological connection and/or when the separation occurred.

To illustrate, suppose Petitioners' themselves had excavated the ditch and constructed the earthen berm in, say, 1992 and had then claimed their wetlands were no longer under federal jurisdiction? No administrative tribunal or court would have taken such a claim seriously. Indeed, civil or criminal proceedings might have been initiated to compel the restoration of any wetland areas that had been harmed or destroyed.

Should the actual circumstances be treated any differently? Petitioners at least acquiesced to a construction project that severed the connection between their remaining wetland and other waters.[44] Now they contend that this project just happened to have eliminated federal

[44] Macomb County is not suggesting Petitioners' had any real choice in the matter.

jurisdiction over their wetland in the bargain.[45] In effect, then, Petitioners are asking this Court to rule that their wetland is not regulated merely because the hydrological separation occurred long ago as a result of actions by other persons.

The Clean Water Act cannot be interpreted to allow self-interested parties opportunities to nullify – with as little effort as a signature granting a utility easement – federal jurisdiction over otherwise regulated waters. This Court surely recognizes that nothing in the Clean Water Act supports the notion that federal authority over waters of the United States turns on *when* waters were separated from other waters or *who* effected the separation. In realty, the Clean Water Act says nothing about hydrological connections at all. Instead, the Act authorizes the federal government to regulate non-navigable waters as necessary in order to protect traditionally navigable waters.

IV. CONCLUSION

A decision holding that the Clean Water Act regulates only wetlands that have a direct hydrological connection to navigable waters would utterly frustrate the central purpose of the Act – to protect and restore the ecological integrity of the waters of the United States. Rolling back federal authority over adjacent wetlands would also seriously undermine Macomb County's efforts to protect

[45] This Court may take judicial notice of the public information presented with this Brief. FRE 201. Even if this Court chooses to disregard the evidence regarding the sewer project presented here, however, the record of this case clearly shows that the only thing that prevents water from flowing from Petitioners' wetland to the Sutherland-Oemig Drain is a man-made object – the earthen berm.

Lake St. Clair and its tributaries, an effort that is absolutely critical to the economic and social well-being of the County. For these reasons, Macomb County respectfully urges this Court to rule that Petitioners' wetland is regulated under the Clean Water Act because it is adjacent to tributaries of the navigable waters of Au Vase Creek and Lake St. Clair.

Respectfully submitted,

ERIC J. SMITH
Macomb County Prosecuting Attorney
MARK A. RICHARDSON
Macomb County Assistant Prosecuting
Attorney for Water Quality
One South Main Street, 3rd Floor
Mt. Clemens, Michigan 48043
(586) 469-5350
Attorneys for Amicus Curiae Macomb County Michigan

DATED: January 13, 2006

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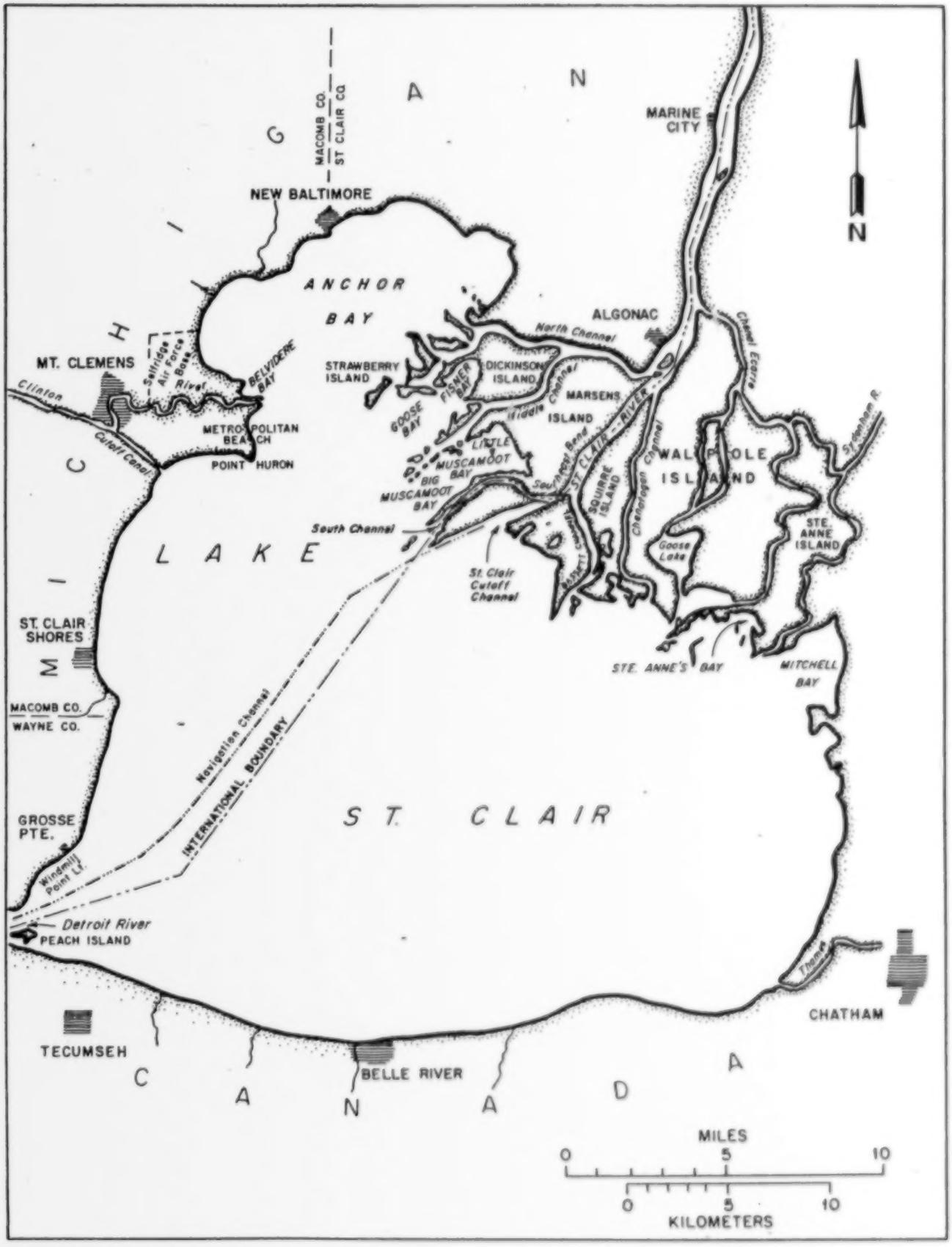
EXHIBIT 1



Contemporary Lake St. Clair, the St. Clair Delta, and tributaries.

EXHIBIT 2

Vegetation circa 1800 of Macomb County, Michigan

An Interpretation of the General Land Office Surveys

By P. J. Comer and D. A. Albert
Michigan Natural Features Inventory
1997

SOURCE: Comer, P.J., D.A. Albert, H.A. Wells, B.L. Hart, J.B. Raab, D.L. Price, D.M. Kashian, R.A. Corner, D.W. Schuen (Map Interpretation) R.B. Austin, T.R. Leibfried, K.M. Klemoch, L. Prange-Gregory, J.D. Bohlinq, C.J. DeLain, L.J. Scrimger. (Digital Map Production). 1995. Michigan's Presettlement Vegetation, as Interpreted from the General Land Office Surveys 1816-1856. Michigan Natural Features Inventory, Lansing, MI. Digital Map.

Michigan DNR
Department of Natural Resources
Wildlife Division

MICHIGAN STATE UNIVERSITY EXTENSION

Michigan Natural Features Inventory

Scale 1:50,000

Miles

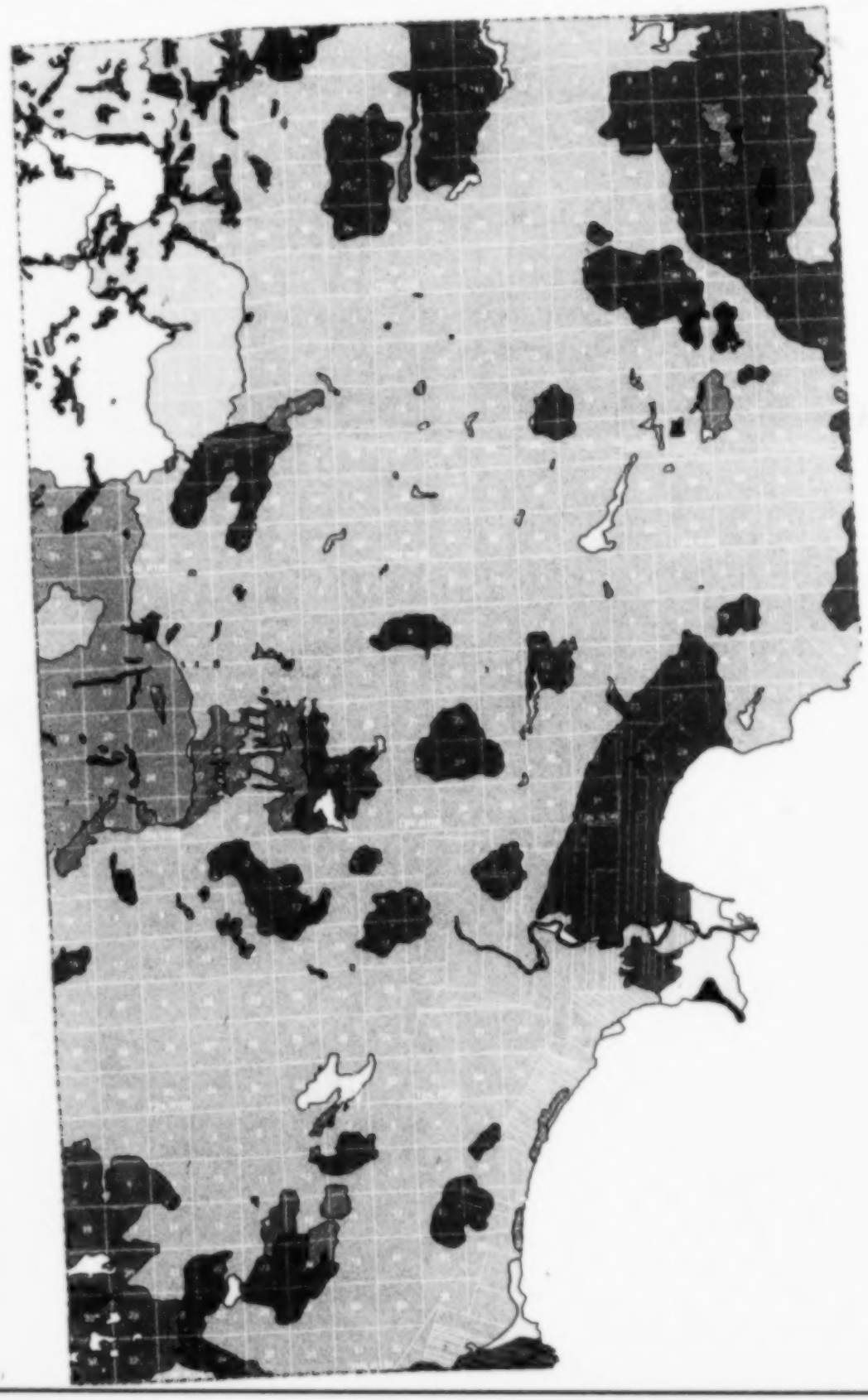
Kilometers

Map Projection: Lambert Conformal Conic

Legend

- ASPEN-BIRCH FOREST
- ✓ BEECH-SUGAR MAPLE FOREST
- BEECH-SUGAR MAPLE-HEMLOCK FOREST
- ✓ BLACK ASH SWAMP
- ✓ BLACK OAK BARREN
- ✓ CEDAR SWAMP
- GRASSLAND
- HEMLOCK-WHITE PINE FOREST
- HEMLOCK-YELLOW BIRCH FOREST
- JACK PINE-RED PINE FOREST
- ✓ LAKE/RIVER
- ✓ MIXED CONIFER SWAMP
- ✓ MIXED HARDWOOD SWAMP
- ✓ MIXED OAK FOREST
- ✓ MIXED OAK SAVANNA
- MIXED PINE-OAK FOREST
- ✓ MUSKEG/BOG
- ✓ OAK-HICKORY FOREST
- OAK-PINE BARREN
- PINE BARREN
- ✓ SAND DUNE
- ✓ SHRUB SWAMP/EMERGENT MARSH
- SPRUCE-FIR-CEDAR FOREST
- ✓ WET PRAIRIE
- WHITE PINE-MIXED HARDWOOD FOREST
- WHITE PINE-RED PINE FOREST
- WHITE PINE-WHITE OAK FOREST

✓ = LAND COVER TYPE PRESENT ON THIS MAP



Site Location Map

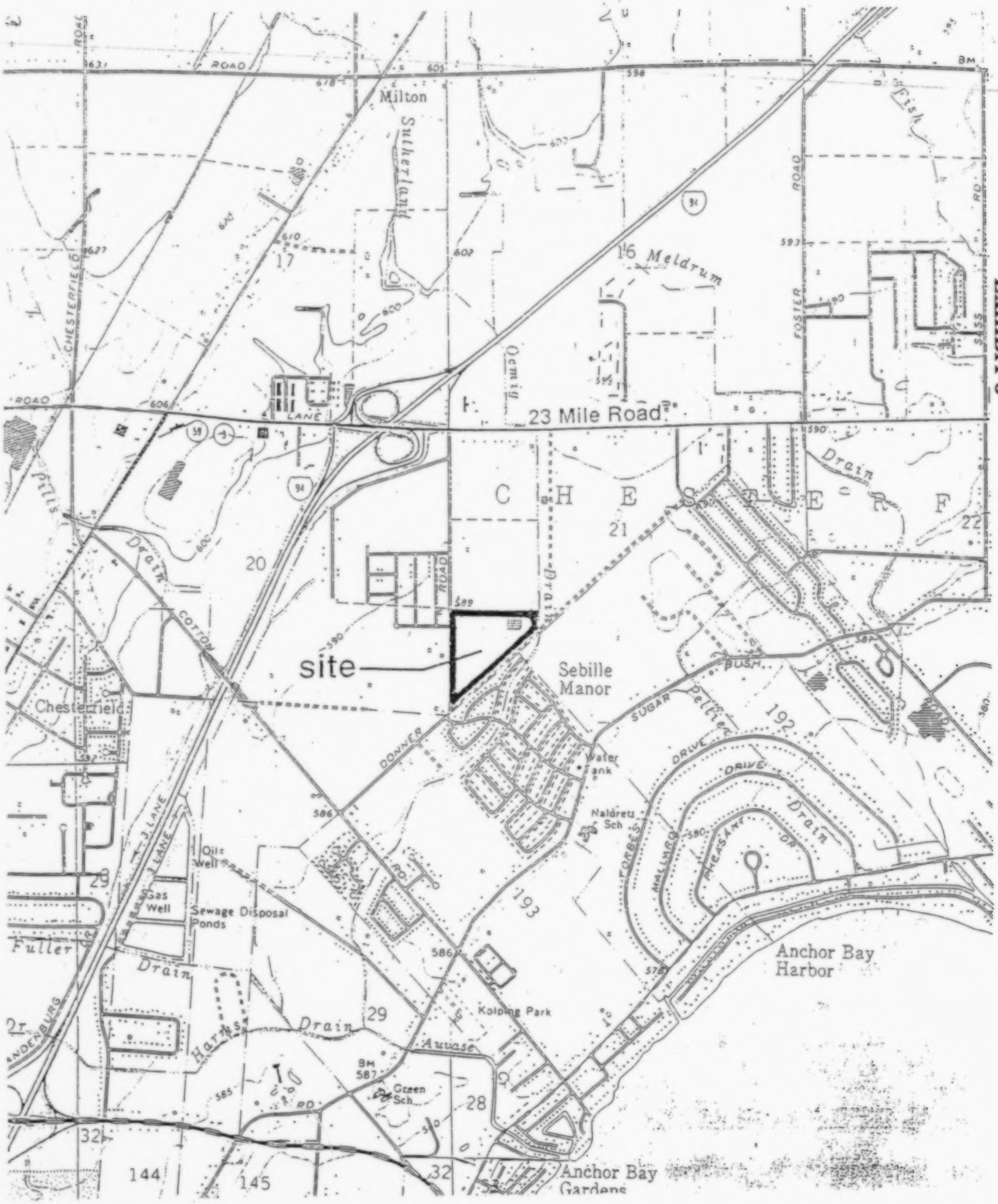
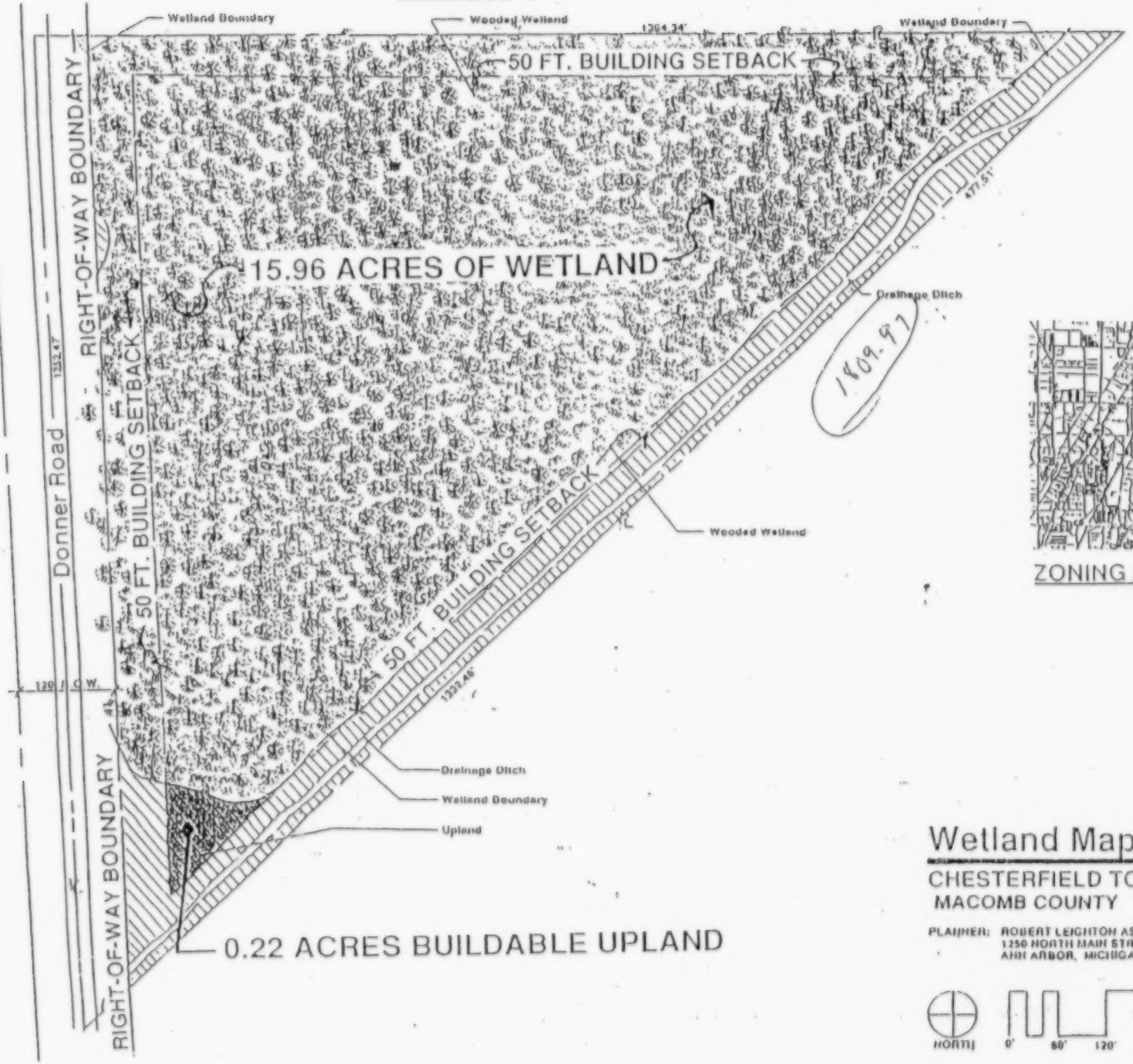


EXHIBIT 3

App. 3

EXHIBIT 4



ZONING / LOCATION MAP
NOT TO SCALE

Wetland Map

CHESTERFIELD TOWNSHIP
MACOMB COUNTY MICHIGAN

PLANNER: ROBERT LEIGHTON ASSOCIATES, INC.
1250 NORTH MAIN STREET
ANN ARBOR, MICHIGAN 48104

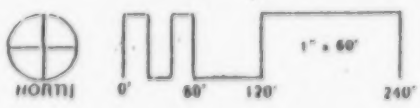


EXHIBIT 5A

Chesterfield Township As Built Sewer Plan

[Blue Print Reproduction In Pocket On Inside Back Cover]

EXHIBIT 5B

Chesterfield Township As Built Sewer Plan

[Blue Print Reproduction In Pocket On Inside Back Cover]

EXHIBIT 6

1956 1 inch equals 1,000 feet

1962 1 inch equals 1,000 feet

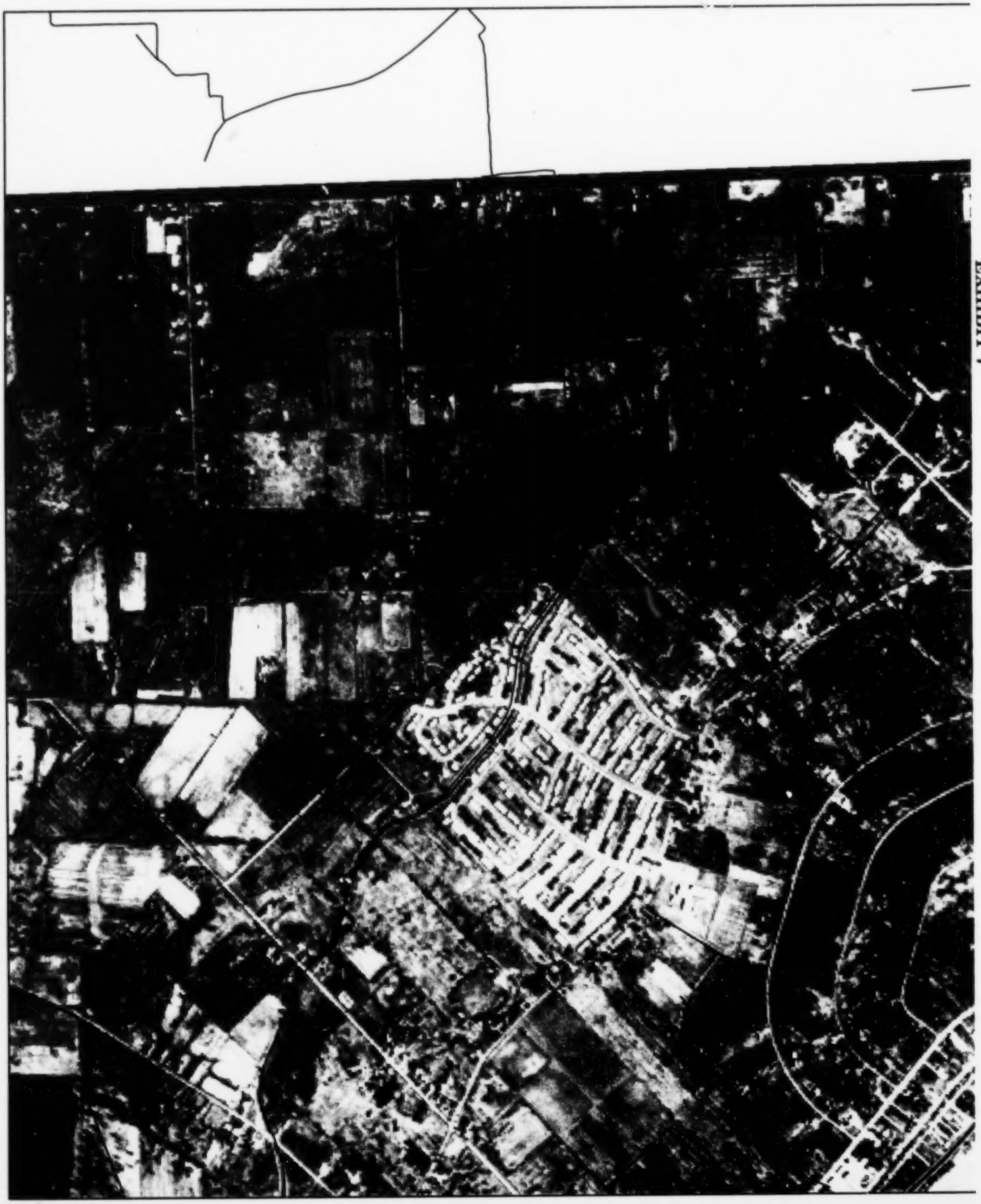


EXHIBIT 7

WARRANTY DEED—Statutory Form
Act. 187 P.A. 1891 - M.S.A. 26.571

LIBER 2662 PAGE 471

Furnished by AMERICAN TITLE INSURANCE COMPANY

A347293

KNOW ALL MEN BY THESE PRESENTS: That James A. Michael and Jacqueline D. Michael, husband and wife, Joseph Michaels and Thelma Michaels, husband and wife, and Charles R. Towner and Marian G. Towner, husband and wife,

whose Street Number and Post Office address is 37965 North Bonkay Drive, Mount Clemens, Michigan

Convey and Warrant to Robert Piersol, Keith A. Carabell, Stanton P. Bocknek, Harvey Gordenker and Robert Palmer

whose Street Number and Post Office address is 10 South Broadway, Mount Clemens, Michigan

the following described premises situated in the Township of Chesterfield, County of Macomb and State of Michigan, to-wit:

Town 3 North, Range 14 East of Section 21, commencing at the northwest corner of Section 21, thence south 0 degrees 36' west 3016.99 feet to the point of beginning; thence south 0 degrees 36' west 1252.47 feet, thence north 49 degrees 18' east 1332.46 feet; thence north 49 degrees 53' east 477.51 feet; thence north 86 degrees 49' west 1365.34 feet to the point of beginning; containing 19.52 acres of land, more or less. Subject to the rights of the public and of any governmental unit in any part thereof taken, used or deeded for street, road or highway purposes.

EXHIBIT 8

App. 9

PARCEL NUMBER: 09 21 301 002

RECORDED IN MACOMB COUNTY RECORDS AT: 11:01 A.M. MAR 3 1976

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

for the sum of Seventy Thousand and no/100 ($70,000.00) Dollars.

3-3-76
Edna Mitchell
CLERK - REGISTER OF DEEDS
MACOMB COUNTY, MICHIGAN

subject to easements and restrictions of record.

Accompanying this deed is a warranty deed from Zenith Steel & Metal Co. which is also part of the selling group who were all purchasers under a land contract from Mr. and Mrs Antonios Katakis.

Dated this 5th day of July, A.D. 19 71

Signed and Sealed in Presence of:

Susan H. Grant
Susan H. Grant

Elaine M. Viccars
Elaine M. Viccars

MAR-3'76 $7.00 P.B. 10845

Signed and Sealed:

James A. Michael (L. S.)
James A. Michael

Jacqueline D. Michael (L. S.)
Jacqueline D. Michael

Joseph Michaels - Thelma Michaels
Joseph Michaels Thelma Michaels

Marian G. Towner
Marian G. Towner

Charles R. Towner (L. S.)
Charles R. Towner

In the STATE OF MICHIGAN, COUNTY OF MACOMB ss.

On this 5th day of July, A. D. 19 71 before me personally appeared James A. Michael, Jacqueline D. Michael, husband and wife, Joseph Michaels, Thelma Michaels, husband and wife and Charles R. Towner and Marian G. Towner, husband and wife to me known to be the person s described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

My commission expires January 25th, A. D. 1975.

Susan H. Grant
*Susan H. Grant
Notary Public Macomb County, Michigan

*Print typewrite or stamp name under signature

This is to certify that County Treasurer's records there are no tax liens on this property and that taxes are not for the year previous to date of this instrument except 19 2266

Date NOT EXAMINED MAR 2 1976

ADAM E. NOWAKOWSKI, Macomb County Treasurer, Per

This certification does not include current taxes now being collected

City Treasurer's Certificate

Person who drafted this instrument

Charles R. Towner
Two Crocker Blvd.
Mt. Clemens, Mich.

Recording Fee

Transfer Tax 7.00

When recorded return to

Dank, Peterson and Hay, P.C.
Nine South Gratiot Avenue
Mount Clemens, Michigan 48043

TITLE INSURANCE — ESCROWS ALL OF MC 365B

BEST AVAILABLE COPY

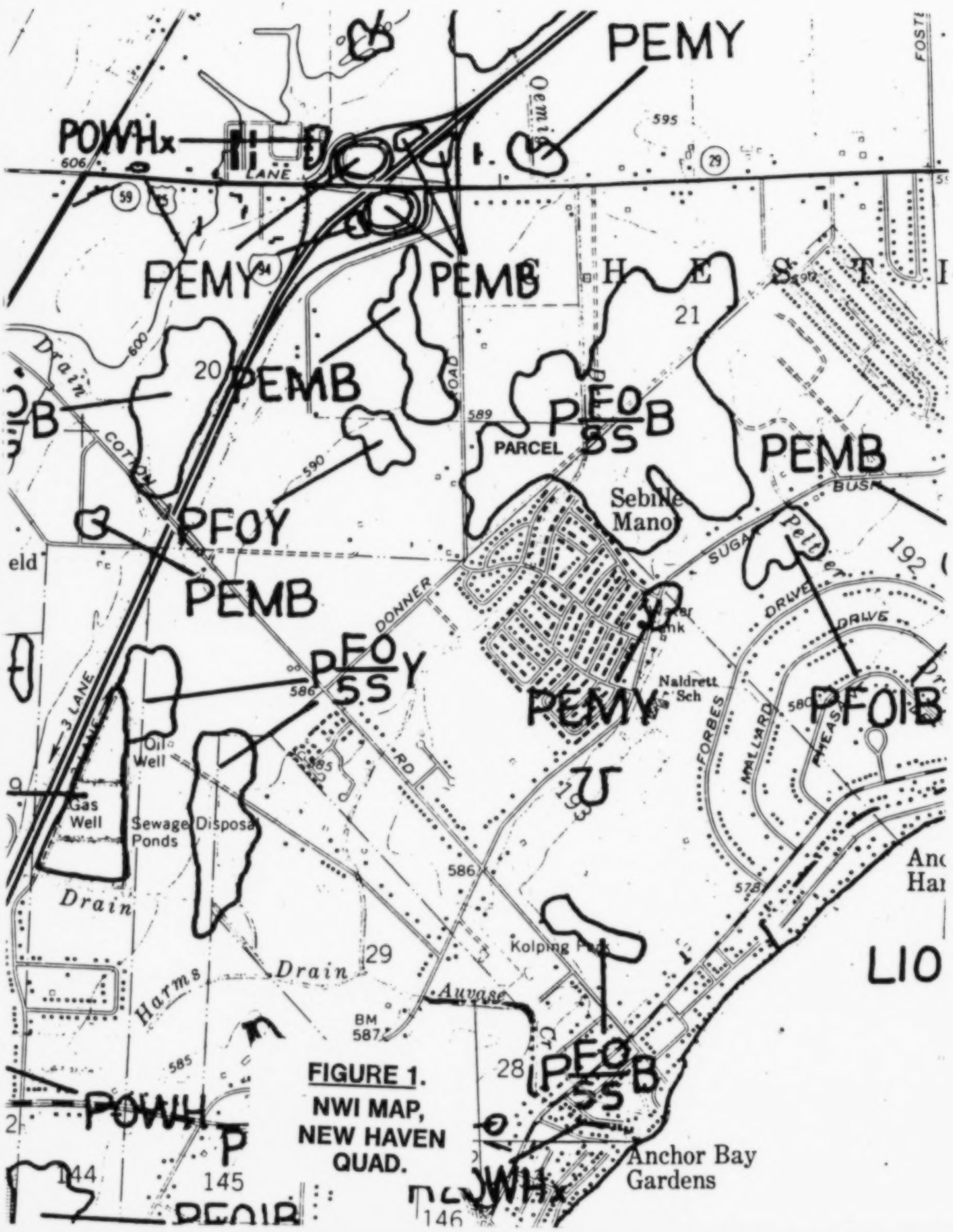
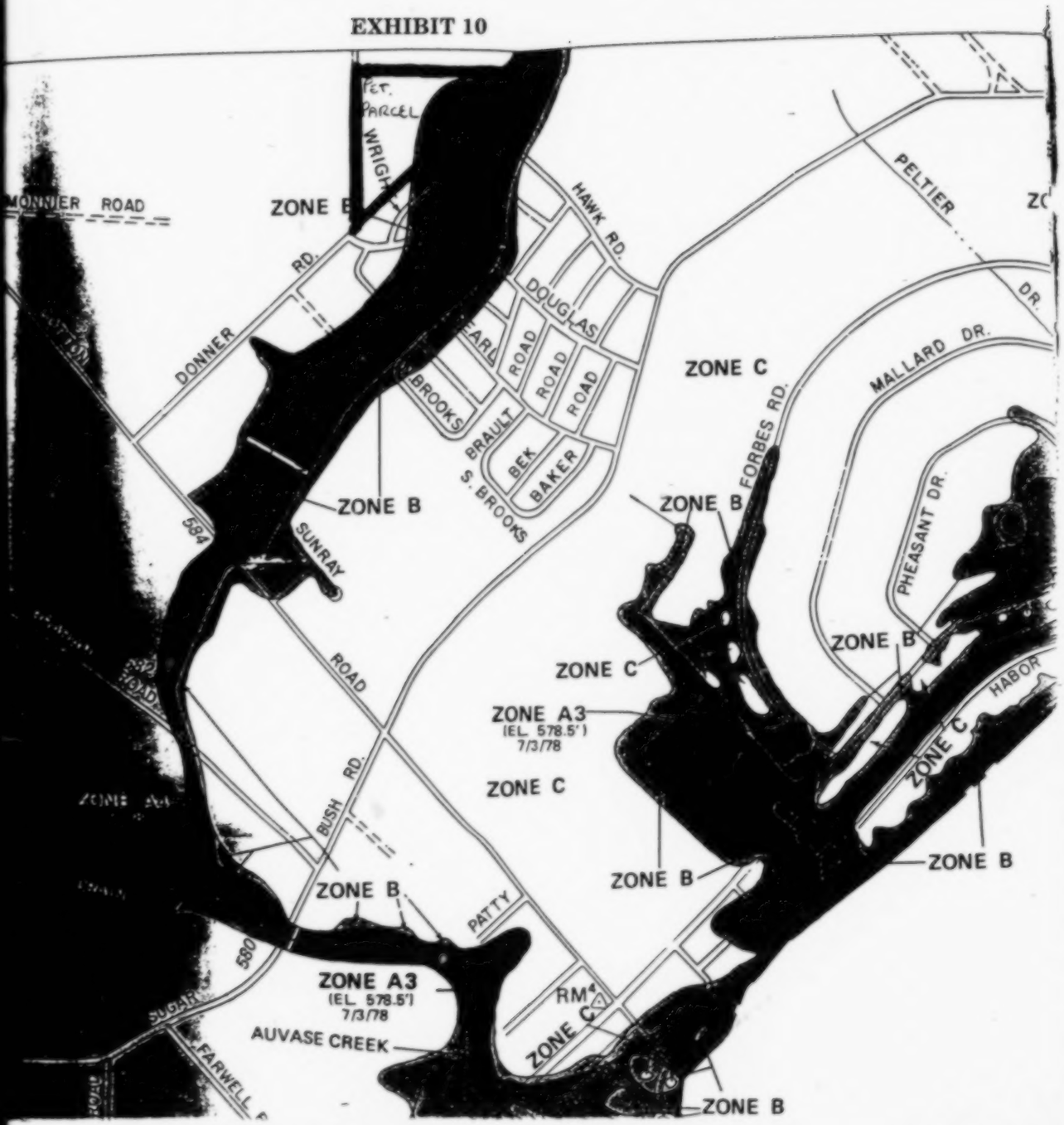


FIGURE 1.
NWI MAP, NEW HAVEN QUAD.

EXHIBIT 10



KEY TO MAP

500-Year Flood Boundary ——→

100-Year Flood Boundary ——→

Zone Designations* With Date of Identification e.g., 12/2/74

100-Year Flood Boundary ——→

500-Year Flood Boundary ——→

Base Flood Elevation Line With Elevation In Feet** — 513

Base Flood Elevation In Feet Where Uniform Within Zone** (EL 987)

Elevation Reference Mark $RM7_X$

River Mile • M1.5

**Referenced to the National Geodetic Vertical Datum of 1929

*EXPLANATION OF ZONE DESIGNATIONS

ZONE	EXPLANATION
A	Areas of 100-year flood; base flood elevations and flood hazard factors not determined.
A0	Areas of 100-year shallow flooding where depths are between one (1) and three (3) feet; average depths of inundation are shown, but no flood hazard factors are determined.
AH	Areas of 100-year shallow flooding where depths are between one (1) and three (3) feet; base flood elevations are shown, but no flood hazard factors are determined.
A1-A30	Areas of 100-year flood; base flood elevations and flood hazard factors determined.
A99	Areas of 100-year flood to be protected by flood protection system under construction; base flood elevations and flood hazard factors not determined.
B	Areas between limits of the 100-year flood and 500-year flood; or certain areas subject to 100-year flooding with average depths less than one (1) foot or where the contributing drainage area is less than one square mile; or areas protected by levees from the base flood. (Medium shading)
C	Areas of minimal flooding. (No shading)
D	Areas of undetermined, but possible, flood hazards.
V	Areas of 100-year coastal flood with velocity (wave action); base flood elevations and flood hazard factors not determined.
V1-V30	Areas of 100-year coastal flood with velocity (wave action); base flood elevations and flood hazard factors determined.

NOTES TO USER

Certain areas not in the special flood hazard areas (zones A and V) may be protected by flood control structures.

This map is for flood insurance purposes only; it does not necessarily show all areas subject to flooding in the community or all planimetric features outside special flood hazard areas.

For adjoining map panels, see separately printed Index To Map Panels.

INITIAL IDENTIFICATION
JUNE 28, 1974

CONVERSION TO REGULAR PROGRAM

C3544ZA

C3544I

C5044ZA

DONJER ROAD

DONJER ROAD

C5656
44-1

09-

PROPOSED 25' PERMANENT EASEMENT

PROP. 25' CONSTRUCTION EASEMENT

15" SAN.

15" SAN.

15" SAN.

15" SAN.

15" SAN.

C583

C582

C580-A & 581

2 | 3

2 | 3

℄ STA.

TOP OF CURB ELEV.

590

585

580

575

570

565

570

585

580

575

570

310'AB

311'AB

311'AB

310'AB

287'AB

PROPOSED 15" MAIN MAIN

OPEN CUT CONSTRUCTION ACROSS DONNER ROAD

EX 15" SAN.

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

30" LF 15" CLASS 3 @ 0.15%

SECTION MAP CODE	35-7 | 35-8
55	320
SEQUENCE NUMBER	

EXISTING SAN. SEWER
EXISTING STORM SEWER
EXISTING WATER MAIN
EXISTING GAS MAIN
EXISTING OR UNDERGROUND
EXISTING OVERHEAD UTILITY
FENCE
MANHOLE
WELL AND WELL
PROP. SAN. SEWER & MANHOLE
PROP. STORM SEWER & MANHOLE
PROP. WATER MAIN, HYDRANT & GATE VALVE & WELL
PROP. CATCH BASIN - PAVEMENT TYPE
PROP. CATCH BASIN - SEAWAY TYPE

SECTION OR CENTER LINE

REVISIONS
PLANS PREPARED FOR BIDDING 11-16-71
ADDENDUM NO.1 6-16-72
AS-BUILT PLANS 7-8-75

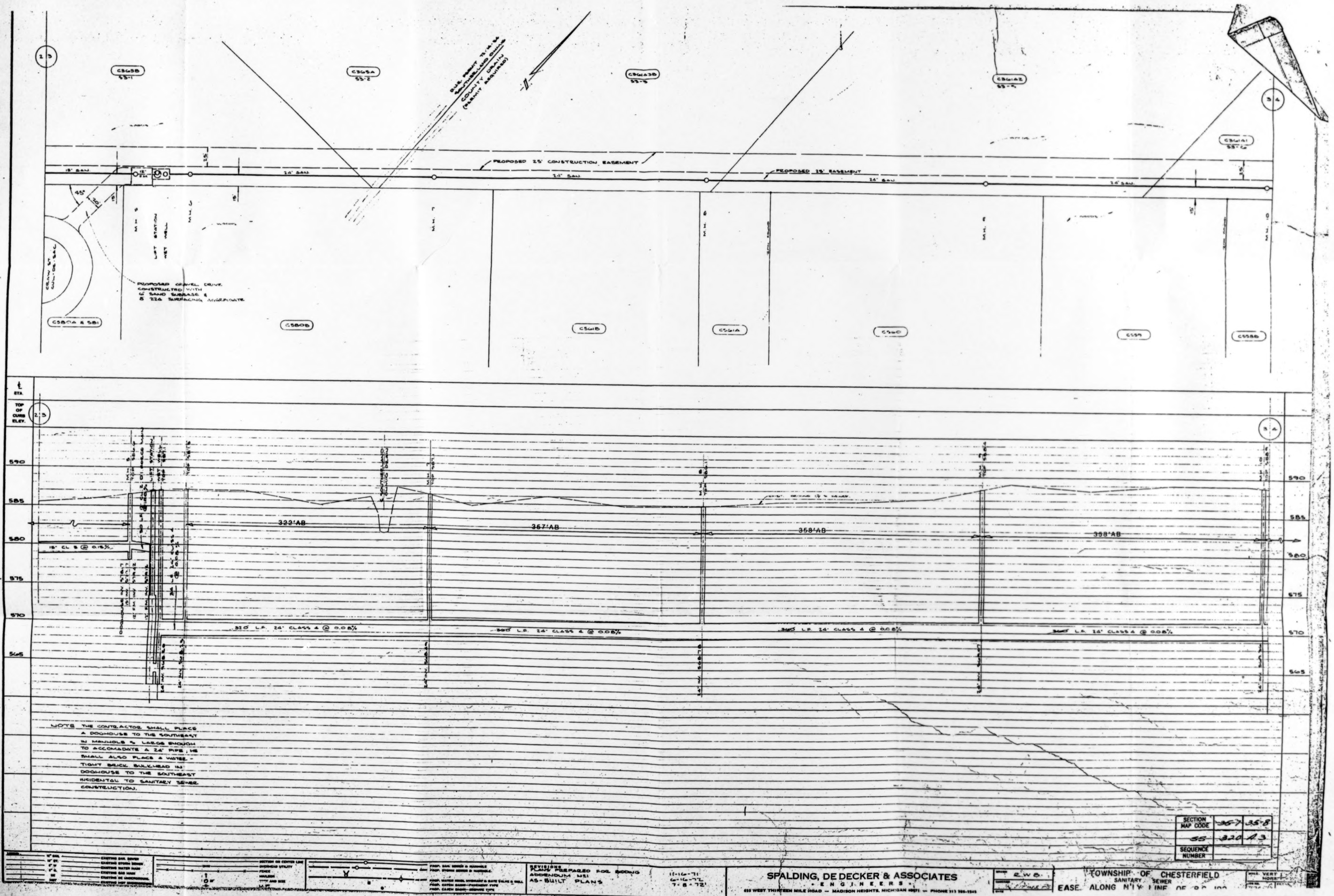
SPALDING, DEDECKER & ASSOCIATES
ENGINEERS
555 WEST THIRTEEN MILE ROAD — MADISON HEIGHTS, MICHIGAN 48071 — PHONE 313 585-5545

R.W.B.
11-15-71

TOWNSHIP OF CHESTERFIELD
SANITARY SEWER
EASE. ALONG N'LY. LINE OF P.C. 193
FROM DONNER RD. TO 1500' N.E.

BEST AVAILABLE COPY

No. 04-1384
Carabell v. US Army Corps of Eng'rs
Amicus Curiae Brief
EXHIBIT 5A



NOTE THE CONTRACTOR SHALL PLACE A DOGHOUSE TO THE SOUTHEAST IN MANHOLE # 5 LARGE ENOUGH TO ACCOMADATE A 24" PIPE. HE SHALL ALSO PLACE A WATER-TIGHT BRICK BULKHEAD IN DOGHOUSE TO THE SOUTHEAST INCIDENTAL TO SANITARY SEWER CONSTRUCTION.

SECTION MAP CODE	35-7	35-8
55	320	A 3
SEQUENCE NUMBER		

EXISTING SAN. SEWER
EXISTING STORM SEWER
EXISTING WATER MAIN
EXISTING GAS MAIN
EXISTING OE UNDERGROUND
SECTION OR CENTER LINE
OVERHEAD UTILITY
FENCE
MANHOLE
TYPE AND SIZE
W.F.
PROP. SAN. SEWER & MANHOLE
PROP. STORM SEWER & MANHOLE
PROP. WATER MAIN, HYDRANT & GATE VALVE & WELL
PROP. CATCH BASIN - PAVEMENT TYPE
PROP. CATCH BASIN - GROWTH TYPE

REVISIONS
PLANS PREPARED FOR BIDDING 11-16-71
ADDENDUM #2 6-16-72
AS-BUILT PLANS 7-18-72

SPALDING, DE DECKER & ASSOCIATES
• ENGINEERS •
655 WEST THIRTEEN MILE ROAD — MADISON HEIGHTS, MICHIGAN 48071 — PHONE 313 588-9545

DRAWN E.W.S.
CHECKED

TOWNSHIP OF CHESTERFIELD
SANITARY SEWER
EASE. ALONG N'LY LINE OF S.D. 100

SCALE: HORIZ. 1" = 50' VERT. 1" = 5'

No. 04-1384
Carabell v. US Army Corps of Eng'rs
Amicus Curiae Brief
EXHIBIT 5B

Nos. 04-1034 and 04-1384

In The Supreme Court of the United States

JOHN A. RAPANOS, JUDITH A. NELKIE RAPANOS, PRODO, INC., ROLLING MEADOWS HUNT CLUB, and PINE RIVER BLUFFS ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, and FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

WILLIAM PERRY PENDLEY*
**Counsel of Record*
RONALD W. OPSAHL
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extends to nonnavigable, intrastate wetlands that do not abut a navigable water?

2. Whether extension of the Clean Water Act jurisdiction to every nonnavigable, intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceeds Congress's constitutional power to regulate commerce among the States?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act, are implemented and enforced in a manner consistent with the Constitution of the United States.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole, or in part, and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The federal government's imposition of jurisdiction purportedly in accordance with the Clean Water Act may not extend to nonnavigable, intrastate wetlands that do not abut navigable waters. Further, extension of jurisdiction to every nonnavigable, intrastate wetland with even the most tenuous or remote of hydrological connections exceeds Congress's constitutional powers to regulate commerce among the States. One of a State's traditional roles includes the right to regulate land use within the State.

Historically, States have employed their authority over land use to regulate uses that would affect wetlands. In fact, long before enactment of the Clean Water Act, many States had passed laws to regulate land use in wetland areas. Indeed, despite the encroachment on States' traditional roles by the federal government, States continue to regulate wetlands. As a result, the removal of the unconstitutional imposition of federal jurisdiction over nonnavigable, intrastate wetlands would result in little, if any, gap in wetland protection, as States resume primary enforcement of land use.

Moreover, given this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the federal government's inclusion of nonnavigable, intrastate wetlands within the definition of "waters of the United States" is unreasonable and not entitled deference. To extend jurisdiction to these wetlands exceeds Congress's authority under the Commerce Clause, and therefore

cannot be a reasonable interpretation of the Clean Water Act's definition of "waters of the United States."

ARGUMENT

Petitioners are accused of filling wetlands on their properties without a federal permit in purported violation of section 404 of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1344. The properties at issue entail nonnavigable, intrastate wetlands that do not abut navigable waters, but instead are separated, by distances ranging from approximately one mile to as far as 20 miles, from the nearest navigable water. Despite that these remote wetlands are not adjacent to waters of the United States and have only an attenuated, if any, connection to navigable waters, the federal government has asserted jurisdiction over Petitioners' properties under section 404 of the CWA.

To the detriment of private landowners and in conflict with the authority of the States to regulate lands within their borders, the federal government has employed an expansive interpretation of its jurisdiction over "waters of the United States."[2] The federal government now interprets

[2] On its face, CWA section 404 requires landowners to obtain a permit from the United States Army Corps of Engineers in order to discharge dredged or fill material into "navigable waters." 33 U.S.C. § 1344(a). "Navigable waters" has been defined by Congress as "waters of the United States, including the territorial seas." *Id.* § 1362(7). In regulation, the Corps of Engineers has defined "waters of the United States" to include waters that are navigable in fact, waters subject to tidal forces, all interstate waters including interstate wetlands, and *all other waters "such as intrastate . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce."*

(Continued on following page)

its jurisdictional authority under the CWA to include "adjacent waters" of "wetlands" where the only nexus between the "wetlands" and navigable waters is the mere presence of some purported "hydrological connection." *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004). Such an expansive interpretation of the CWA has never been sustained by this Court and was soundly rejected in *SWANCC*. 531 U.S. 159 (2001). Moreover, the federal government's interpretation of its jurisdictional authority under the CWA raises serious constitutional questions and creates a distinct conflict among the Courts of Appeals and confusion among administrative agencies. *See In re Needham*, 354 F.3d 340 (5th Cir. 2003) (reading *SWANCC* broadly to limit the CWA to navigable and non-navigable waters that directly abut navigable waters); *FD & P Enters., Inc. v. United States Army Corps of Eng'rs*, 239 F.Supp.2d 509 (D.N.J. 2003) (same); *but see Rapanos*, 376 F.3d 629 (6th Cir. 2004) (interpreting *SWANCC* narrowly to hold that the CWA reaches inland waters that purportedly share a hydrological connection with navigable waters); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407 (4th Cir. 2003) (same); *United States v. Rueth Dev. Co.*, 334 F.3d 598 (7th Cir. 2003) (same); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (same).

One of the most fundamental principles of America's system of government is the protection of "historic spheres of state sovereignty from excessive federal encroachment." *Gonzales v. Raich*, ___ U.S. ___, 125 S.Ct. 2195, 2220

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33 C.F.R. § 328.3(1)(a) (emphasis added); *see also* 40 C.F.R. § 122.2 (providing the Environmental Protection Agency's definition of "waters of the United States," which is substantially identical to 33 C.F.R. § 328.3(1)(a)).